No. 95-1682

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Supreme Court of the United States

October Term, 1995

LOUISIANA LEGISLATIVE BLACK CAUCUS,
CONGRESSMAN CLEO FIELDS,
BERNADINE ST. CYR, PATRICK FONTENOT,
HAZEL FREEMAN and RALPH WILSON,

Appellants,

v.

RAY HAYS, *et al.*,

Appellees.

On Appeal from the United States District Court for the Western District of Louisiana

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BRIEF ON BEHALF OF LOUISIANA LEGISLATIVE BLACK CAUCUS, *ET AL.* IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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BRIEF OF LOUISIANA LEGISLATIVE BLACK CAUCUS, *ET AL.*, IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

Appellants, the Louisiana Legislative Black Caucus, Congressman Cleo Fields, and Louisiana voters Bernadine St. Cyr, Patrick Fontenot, Hazel Freeman, and Ralph Wilson, submit this brief in opposition to appellees' Motion to Dismiss or Affirm.

I. THE APPEAL IS NOT MOOT.

A. Appellees' Mootness Argument Would Require this Court to Overturn Decades of Precedent Under Section 5 of the Voting Rights Act.

As a necessary predicate for their argument that the appeal is moot, appellees urge this Court to rule that the preclearance requirements of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, do not apply to the Louisiana Legislature's adoption of a new congressional redistricting plan, Act 96. Motion to Dismiss or Affirm at 12-14. Of course, if preclearance is required under Section 5, then Act 96 is not enforceable as law "until and unless" precleared, *Connor v. Waller,* 421 U.S. 656 (1975) (per curiam), and the attempted repeal of Act 1 is of no legal effect at this time, foreclosing any claim of mootness.

Appellees' novel argument that Section 5 preclearance is unnecessary conflicts with decades of settled precedent under Section 5.[1] Appellees argue that

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[1] *See Georgia v. United States,* 411 U.S. 526 (1973) (redistricting plans are changes with respect to voting subject to Section 5 preclearance); *McDaniel v. Sanchez,* 452 U.S. 130 (1981) (redistricting plans are subject to Section 5 preclearance even when enacted in direct response to federal court order).

preclearance of Act 96 is not required because the Louisiana Legislature merely enacted a redistricting plan to comply with an order of the federal district court. Motion to Dismiss or Affirm at 13 ("Surely the Voting Rights Act does not prevent a State from enforcing the voting procedures it has been *ordered* to follow by a three-judge federal court") (emphasis in original).[2] This Court rejected just such an argument in *McDaniel v. Sanchez*, holding as follows:

> As we construe the federal mandate, it requires that whenever a covered jurisdiction submits a proposal reflecting the policy choices of the elected representatives of the people -- *no matter what constraints have limited the choices available to them* -- the preclearance requirement of the Voting Rights Act is applicable.

452 U.S. at 153 (emphasis added). Further, in support of its holding in *McDaniel*, this Court cited the legislative history accompanying Section 5, as follows:

> "The one exception where Section 5 review would not ordinarily be available is where the court,

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[2] Elsewhere, appellees unceremoniously abandon this characterization of the Legislature's action, instead declaring it a voluntary political decision. *See* Motion to Dismiss or Affirm at 1 ("rather than have a federal-court plan imposed on Louisiana by force, the State has decided to adopt that plan voluntarily. The political process has worked.") Notwithstanding appellees' indecision on this issue, for purposes of Section 5 review, legislative action does not enjoy a safe harbor simply because it is alleged to be responsive to a federal court order. *McDaniel v. Sanchez*, 452 U.S. at 148-149. In any event, the district court did not order Louisiana to enact legislation repealing Act 1.

> because of exigent circumstances, actually fashions the plan itself instead of relying on a plan presented by a litigant. This is the limited meaning of the 'court decree' exception recognized in *Connor v. Johnson*, 402 U.S. 690. *Even in these cases, however, if the governmental body subsequently adopts a plan patterned after the court's plan, Section 5 review would be required.*"

McDaniel v. Sanchez, 452 U.S. at 149, quoting S. Rep. No. 94-295, pp. 18-19 (1975) (emphasis added). Thus, the argument that Act 96 somehow did not effect a change covered by Section 5, even though it repealed Act 1 and replaced it with a new redistricting scheme that dramatically reduces black voting strength in electing Louisiana's congressional delegation, simply collapses when examined in light of *McDaniel v. Sanchez*.

Because Act 96, including its repeal of Act 1, is not valid as law without preclearance, *Clark v. Roemer*, 500 U.S. 646, 652-53 (1991), the appeal of the District Court's judgment striking down Act 1 is not moot. If the district court's decision striking down Act 1 is reversed (and/or stayed) by this Court, Act 1 will be the legally enforceable plan in effect in Louisiana. An appeal is not moot when this Court can grant effective relief, *see Church of Scientology of California v. United States*, 113 S. Ct. 447, 449 (1992), and this Court clearly can grant such relief on this appeal, given the absence of any precleared replacement legislation.[3]

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[3] Furthermore, even if Louisiana were to obtain preclearance for its legislation, the appeal would not be moot. The district court's injunction permanently bars Louisiana from implementing any congressional redistricting plan other than the plan created by the

B. If the Appeal Were Moot, the Judgment Below Clearly Would Be Subject to Vacatur.

Even if the appellees could establish that the enactment of unprecleared legislation moots this appeal, the proper relief would be an order vacating the district court's judgment. The defendant-intervenors, all of whom are proper parties to this appeal, are in no way responsible for the enactment of Act 96. If all appeals from the judgment below are moot by virtue of the Louisiana Legislature's enactment of a new apportionment scheme, then the appealing parties (excepting, *arguendo*, the State of Louisiana through its Attorney General) should not be bound by a judgment, review of which they sought without success due to circumstances beyond their control, *see U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386, 390, 391 (1994), *citing Karcher v. May*, 484 U.S. 72, 82, 83 (1987), and *United States v. Hamburg-Amerikanische*

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district court unless Louisiana obtains advance approval for such plan from the court. La. J.S. App. 39-40. The district court's order includes no time limit but applies to all future congressional redistricting efforts by the state. *Id.* In the absence of the district court's injunction, Louisiana would be free to reinstate Act 1 or another redistricting plan different from the plan ordered by the federal court. Moreover, in light of the narrow margin by which Act 96 passed the Louisiana Senate (20-19), many legislators obviously harbored substantial doubts as to the desirability of the plan, and there is no question but that the Louisiana Legislative Black Caucus, whose members voted against Act 96, would introduce legislation to restore Act 1 or a similar plan if the decision below is reversed. Thus, this Court's reversal of the district court's decision would grant effective relief by removing the bar of the district court's injunction and permitting the Louisiana Legislature to conduct congressional redistricting free of the constraints imposed by the district court.

Packetfahrt-Actien Gesellschaft, 239 U.S. 466, 477-78 (1916).

In requesting that the judgment remain standing, despite the alleged mootness of the appeal, appellees rely on cases where all of the appellants who were proper parties to the appeal had voluntarily chosen to moot the case or to drop any appeal. Motion to Dismiss or Affirm at 14, citing *Karcher v. May* and *U.S. Bancorp*. Such cases are simply inapposite here, where the defendant-intervenors are proper parties to the appeal, *see Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 375-376 (1987), and the defendant-intervenors opposed the enactment that is alleged to result in mootness.

As this Court recognized in *U.S. Bancorp*, "[a] party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." *U.S. Bancorp*, 115 S. Ct. at 393.[4] Defendant-intervenors are in

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[4] *U.S. Bancorp* involved a request to vacate a lower court judgment that had become moot because of a formal settlement of a commercial dispute by private parties; the narrow holding of the decision is simply that "mootness by reason of settlement does not justify vacatur of a judgment under review." 115 S. Ct. at 393. Even Louisiana, the sole appellant to which the *U.S. Bancorp* ruling could arguably apply, entered into no settlement with the plaintiffs in this case. Under such circumstances, the *U.S. Bancorp* ruling would not necessarily bar vacatur even if Louisiana were the sole appellant. *See Crowell v. Mader*, 444 U.S. at 506 (1980) (ordering vacatur of district court judgment striking down 1973 redistricting plan after Tennessee legislature enacted new redistricting plan in response to district court ruling); *cf. Haley v. Pataki*, 60 F.3d 137, 142 (2d Cir. 1995) (holding that vacatur of injunction was proper under *U.S. Bancorp* where Governor had voluntarily complied with injunction).

precisely that position here, because they would face arguments that the judgment is preclusive with respect to potential challenges to the legality of Act 96 if the judgment is not vacated, even though they were unable to obtain review of the judgment. *See also Associated General Contractors v. City of New Haven*, 41 F.3d 62, 67 (2d Cir. 1994) ("A party should not suffer the adverse *res judicata* effects of a district court judgment when it is denied the benefit of appellate review through no fault of its own").

Further, even if the State of Louisiana were the only appellant in the case, extending the holding of *U.S. Bancorp* to prevent vacatur here would raise troubling questions because it could effectively serve as a method to evade proper Section 5 review of legislative enactments. Indeed, plaintiffs frankly admit that the purpose of their request for dismissal of these appeals without vacatur of the judgment below is to preclude Section 5 review of Act 96. Motion to Dismiss or Affirm at 14 n.2. Under plaintiffs' theory, if the judgment remains standing despite the absence of an opportunity for appellate review, the State could rely upon the district court's unreviewed ruling to argue that the district court plan is the required benchmark for Section 5 review, thus shielding Act 96 from any meaningful scrutiny of its discriminatory effect and purpose in the Section 5 review process. Application of the *U.S. Bancorp* ruling in this situation would thus have the perverse effect of encouraging manipulation of the litigation process to avoid meaningful Section 5 review, a result against which this Court warned in *McDaniel v. Sanchez*, 452 U.S. at 151.

II. THE COURT SHOULD NOTE PROBABLE JURISDICTION

Appellees offer no cogent defense of the district court's decision, in part because they completely ignore a central legal error on which the district court's decision is based: the district court erroneously believed that Louisiana was barred from modeling District 4 on previous versions of the majority-white old 8th District because "the 'Old Eighth' was never challenged on constitutional grounds." *Hays III*, La. J.S. App. 17 n.48; *see also Hays II*, La. J.S. App. 66 (opinion for court), 78-79 (Shaw, D.J., joined by Wiener, J., concurring). By treating Louisiana's past redistricting practices as inherently suspect, the court erroneously substituted its own redistricting preferences as the benchmark of constitutionality.[5]

This critical error -- which appellees do not even attempt to defend -- infects both major elements of the district court's judgment. By assuming the illegality of

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[5] *Abrams v. Johnson*, No. 95-1425, and *United States v. Johnson*, No. 95-1460, *prob. jur. noted*, __ S. Ct. __ (May 20, 1996), present the issue, *inter alia*, of whether a district court unjustifiably departed from state policy when it redrew Georgia's congressional districts after the state legislature *failed* to agree on a new, remedial redistricting plan. This case presents the related but separate issue of whether a district court overstepped its proper role by invalidating a remedial redistricting plan, Act 1, which the state legislature itself passed in response to *Shaw v. Reno*, 113 S. Ct. 2816 (1993). This case also presents, like the Georgia appeals, the question of whether the district court's substitute remedial plan improperly disregarded the requirements of Section 2 of the Voting Rights Act. Defendant-Intervenor J.S. at 27-29; *see id.* n.21. The Court could address these issues comprehensively by considering this case in tandem with the Georgia appeals.

Louisiana's past redistricting plans, the district court was unable to make a proper determination of whether Act 1 so disregarded the State's traditional practices as to require strict scrutiny under *Miller v. Johnson*, 115 S. Ct. 2475 (1995). *See* Defendant-Intervenors' J.S. at 14-15.[6] The same legal error prevented the district court from properly assessing whether Louisiana was justified in adopting Act 1 in light of Section 2 of the Voting Rights Act; the resemblance between District 4 and the old 8th District made it reasonable for the Legislature to conclude that the black population in Louisiana was sufficiently large and geographically compact to comprise a majority in two districts.[7] *Id.* at 21-13. Contrary to appellees' argument,

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[6] The district court's only other explanation for disregarding the resemblance between District 4 and the old 8th District was its conclusion that the large black population concentration in the old 8th should somehow disqualify it from serving as a permissible basis for a congressional district. *See* La. J.S. App. 16. Appellants have already discussed the clear defects in this reasoning. Defendant-Intervenor J.S. at 15. Further, Appellees indulge in semantics by arguing that the defendants proffered below, then somehow "abandoned," an entirely separate "Red River justification" for the 4th District. Motion to Dismiss or Affirm at 20. Louisiana's 8th District, from 1967 through 1992, was generally centered on the Red River and Mississippi River valleys. Thus, in creating a district modeled on the old 8th, the Legislature also created a district reflective of the commonalities encompassed by this Red River-Mississippi River axis.

[7] The district court's legal error in assessing this Section 2 factor is particularly critical because the other two central factors, black political cohesion and legally significant white bloc voting, are unquestionably present in Louisiana, as established by overwhelming statistical evidence. Defendant-Intervenor J.S. at 18-20. Appellees make no serious argument that these factors are not established by the record here.

such critical legal errors are not shielded from review by the "clearly erroneous" standard. *Johnson v. De Grandy,* 114 S. Ct. 2647, 2662 (1994).

Rather than address this error, appellees argue, in effect, that the Louisiana Legislature should have been guided by mathematical measures of compactness that allegedly disfavor District 4. As defendant-intervenors have already pointed out, however, some of those mathematical measures in fact show District 4 to be similar to Louisiana's previous districts. Reply of Louisiana Legislative Black Caucus, et al., in Further Support of Application for Stay, at 3-4; *see* 10/30/95 Tr. 162-63, testimony of Dr. Ronald Weber, plaintiffs' expert ("For the population compactness, it's saying basically that the [District] 4 population compactness is relatively the same as the compactness of the old District 8 configurations"). Furthermore, the Legislature properly relied upon the obvious visual similarity between District 4 and the old 8th District. Defendant-Intervenor J.S. at 22. Appellees' reliance on mathematical compactness scores that were not even before the Legislature is thus the only pertinent example of "post-hoc rationalization" revealed by the record.[8]

The appeal in this case remains the first in which a state legislature redrew its congressional districts so as to comply with the principles announced in *Shaw v. Reno*, only

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[8] Similarly, contrary to appellees' strained argument, the absence of "compactness" data on Mr. Koepp's computer screen does not remotely support a finding that Act 1 was constructed without regard to non-racial factors. Both Mr. Koepp and the Louisiana Legislature have knowledge of Louisiana and its redistricting history independent of that appearing on Mr. Koepp's computer screen. *See* Defendant-Intervenor J.S. at 4-6 (describing testimony of Glenn Koepp and Louisiana legislators as to process of creating Act 1).

to have its redrawn plan again struck down by a federal court that treated its own redistricting preferences as the only appropriate model for the state to follow. The district court's decision striking down Act 1, replacing it with a plan that dramatically dilutes the votes of black Louisianans, and permanently enjoining Louisiana from implementing any other plan without advance approval from the court, is of extraordinary importance to the people of Louisiana. It also presents the opportunity for this Court to establish how far the federal courts should go in taking over the redistricting process under the aegis of *Shaw* and *Miller*, a matter on which guidance is of vital importance to lower courts and state legislatures confronting litigation under those decisions.

CONCLUSION

The Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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